March 3 1870.
Talbot
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# TRANSCRIPT OF RECORD.

Mr. Justice Clifford

## SUPREME COURT OF THE UNITED STATES.

No. ~~300~~ 102

THE UNITED STATES, APPELLANTS,

vs.

HENRY J. HOSMER.

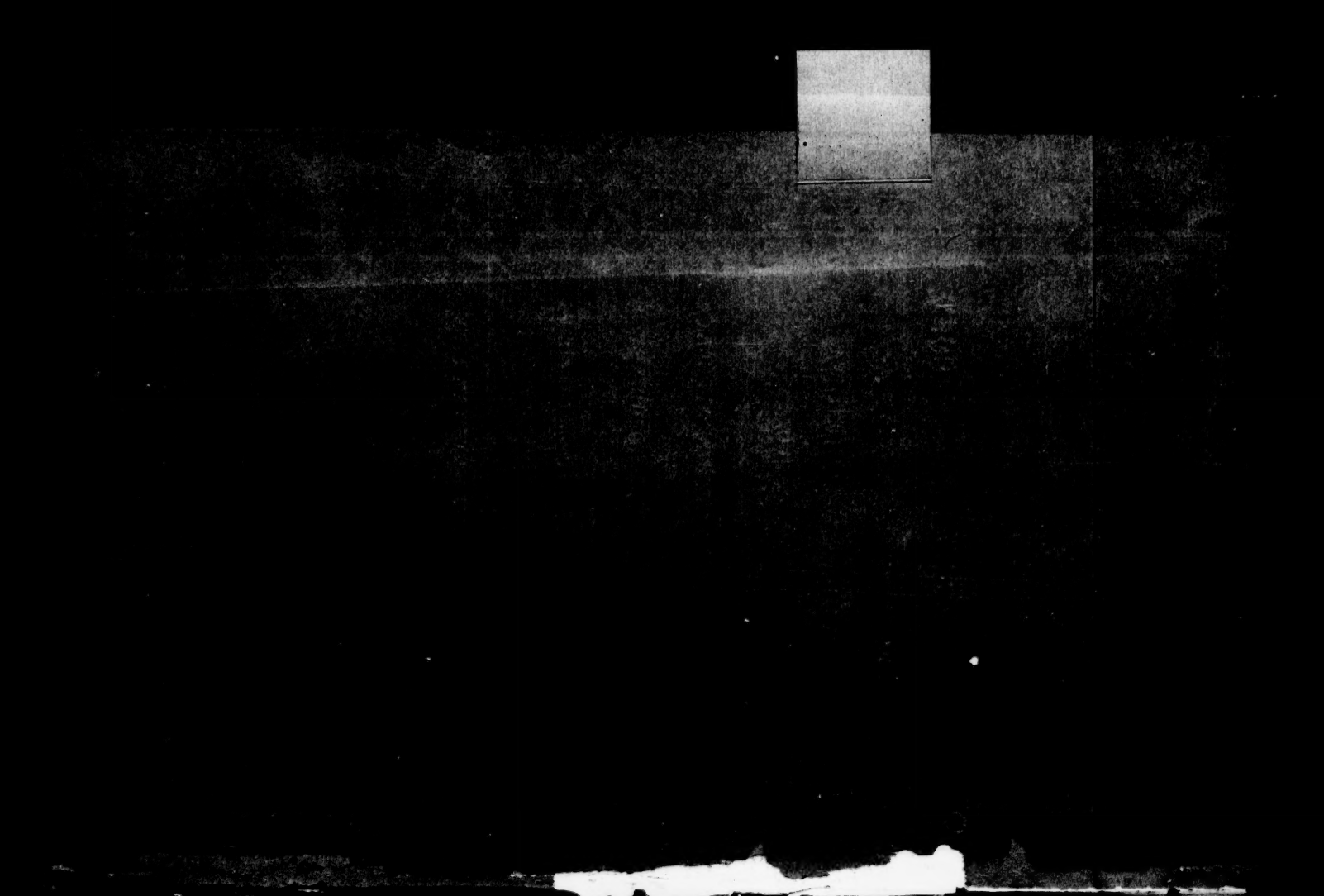
APPEAL FROM THE COURT OF CLAIMS.

Affirmed

FILED NOVEMBER 12, 1868.

Between whom
should record
be transmitted

Appellee
for Supreme



# SUPREME COURT OF THE UNITED STATES.

## No. 300.

THE UNITED STATES, APPELLANTS,

vs.

HENRY J. HOSMER.

APPEAL FROM THE COURT OF CLAIMS.

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Court of Claims.

*Petition of claimant.*

HENRY J. HOSMER
*vs.*
UNITED STATES. } No. 2,891.

To the honorable Justices of the Court of Claims:

Respectfully represents Henry J. Hosmer, of Fitchburg, in the county of Middlesex, and State of Massachusetts, that he was lately a private in company B, 15th regiment of Massachusetts volunteers, which was organized for the suppression of the rebellion against the United States; that he was enrolled and entered the service of the United States on or about the 12th day of July, 1861, and was honorably discharged, by reason of surgeon's certificate of disability, on or about January, 5th, 1863, as will appear by the records of the War Department to which he respectfully refers.

He declares that on the 3d day of May, 1861, the President of the United States called for a volunteer force to aid in the enforcement of the laws and the suppression of insurrection, by a proclamation which states that "the details of enrollment and organization will be made known through the Department of War."

That general orders No. 25, War Department, May 25, 1861, after revsking certain parts of the foregoing order, sta testhat "Every volunteer non-commissioned officer, private, musician, and artificer who enters the service of the United States under this plan, shall be paid, when honorably discharged, the sum of one hundred dollars.

That in pursuance thereof general orders No. 15, War Department, was issued May 4, 1861, which promulgated a plan of organization for said forces; that paragraph 2 of memorandum 4 of said order, promises to "every volunteer non-commissioned officer, private, musician, and artificer who enters the service of the United States under this plan, when honorably discharged the sum of one hundred dollars."

That by act of Congress, August 6, 1861, said proclamation and orders were legalized.

That your petitioner, relying upon the promises set forth as aforesaid by the President of the United States and the Secretary of War, enlisted in the service of the United States and performed his duties faithfully as a soldier, but that by reason of disability his discharge from the service was afterwards deemed necessary before the three years of his enlistment had expired, although not sought by himself. That he was accordingly discharged, honorably, from the service of the United States on or about January 5th, 1863. That he never received "the sum of one hundred dollars" from the United States

although he has endeavored to obtain it from the proper officials, and although honorably discharged without fault on his part.

2 That your petitioner made a claim which was presented to the Paymaster General of the army, in such form as is prescribed ordinarily for bounty claims, about the 1st of March, 1866, and which was rejected March 17, 1866, with the endorsement of the Paymaster General a copy whereof is annexed marked "exhibit A."

That this rejection was sustained by the Second Comptroller of the Treasury, March 26, 1866, in a second endorsement a copy whereof is annexed marked "exhibit B." That your petitioner has therefore made application to the proper executive department without success.

Your petitioner further states that he is the only owner of this claim and that no part of it has at any time been assigned. That he has at all times borne true allegiance to the government of the United States; that he is a citizen of the United States and that he has not in any way voluntarily aided or abetted or given encouragement to the rebellion against the said government.

Wherefore your petitioner prays judgment for the sum of one hundred dollars, as money to which he is entitled by reason of an honorable discharge as aforesaid.

Dated at Boston, Massachusetts, this 30th day of August, A. D. 1867.

(Signed) HENRY J. HOSMER.
By his attorney JAMES SCHOULER.

STATE OF MASSACHUSETTS, *Suffolk, ss*:

Then personally appeared James Schouler, attorney for Henry J. Hosmer, the above claimant, this 30th day of August, A. D. 1867, and made oath that no assignment or transfer of said claim or any part thereof or any interest therein had been made, except as in said petition stated; that said claimant is justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets; and that he believes the facts as stated in said petition are true, and that he, the said Schouler, has a regular warrant of attorney from said claimant, duly executed, which is hereto annexed.

Before me.

[SEAL.] (Signed) ELLIS L. MOTTE,
*Notary Public.*

Claimant's address: Henry J. Hosmer, Fitchburg, Massachusetts.
James Schouler, Boston, Massachusetts, counsel for claimant.

3 *Exhibit A.*

Respectfully returned.

This office unhesitatingly decides that this man has no claim whatever against the U. S. for bounty. The act of Jul. 22, '61, applies

to all 3 years men enlisted into the U. S. service from the commencement of the rebellion to the call of July 18, '64.

By referring to the 1st sec. G. O. No. 38, '64, (which is explanatory of the act of Jul. 22, '61, as well as of G. O. 15 and 25 of 1861, cited within,) it will be seen that the act above referred to was retroactive and unquestionably applies to all soldiers who entered the service for 3 years, between Apl. 19, '61, and Jul. 22, '61, as clearly as if the law had been passed prior to the breaking out of the war.

G. O. No. 38, '64, emanated from the same source as G. O. 15 and 25, of 1861; and what office is more competent to explain the meaning and intent of an order than that in which the order originated?

Even if the act of Jul. 22, '61, had never been passed this man would then have no claim for bounty.

Enlistments under G. O. Nos. 15 and 25, '61, were under the call of the President for 300,000 three years men, and the only discharges contemplated in those orders were by reason of expiration of term of service, or by reason of the government no longer requiring their services in case of the suppression of the rebellion before the expiration of the term for which the men were enlisted.

P. M. G. O., M'ch 17, '66.

B. W. BRICE,
*Paymaster Gen'l.*

*Exhibit B.*

Respectfully returned to Gardner Tufts, esq., Mass. Mil. agent, Washington, D. C.

The Paymaster General is undoubtedly correct in his decision of this case. As this man was discharged for disability other than wounds, before having served two years he is not entitled to bounty under existing laws and regulations.

J. M. BRODHEAD, *Comptroller.*

2 Comps. office, March 25, 1866.

(Copy.)

4 In the Court of Claims.

HENRY J. HOSMER
*vs.*
THE UNITED STATES. } No. 2,891.

It is agreed that the petition of the claimant shall be amended by inserting after the fifth paragraph the words, "That said 15th regiment of Massachusetts volunteers was organized and accepted under the proclamation of general orders aforesaid, for the term of three years, and that your petitioner was duly enrolled for the term of three years in said regiment, under said proclamation and general orders."

(Signed) JAMES SCHOULER,
*Att'y for Claimant.*
E. D. NORTON,
*Solicitor for the United States.*

5 In the United States Court of Claims.—December term, 1867.

HENRY J. HOSMER
*vs.*
THE UNITED STATES. } No. 2,891.

And the United States, by its solicitor, comes and says that the said claimant's petition and the matters and things therein stated and set forth are not sufficient in law for the said claimant to have or maintain his aforesaid action against the said defendant. Wherefore the said defendant prays judgment, &c.

JOHN J. WEED,
*Assistant Solicitor for United States.*

6 In the Court of Claims.

HENRY J. HOSMER
*vs.*
THE UNITED STATES. } No. 2,891.

And now, to wit, 23d December, A. D. 1867, the court, upon due consideration of the premises, do find in favor of the claimant, and do order, adjudge, and decree, that the said Henry J. Hosmer have and recover of and from the United States, the sum of one hundred dollars ($100 00.)

7 In the Court of Claims.

HENRY J. HOSMER
*vs.*
THE UNITED STATES. } No. 2,891.

The United States, by E. P. Norton, its solicitor, now comes and makes application to the honorable Court of Claims, for an appeal of the case of Henry J. Hosmer *vs.* The United States, to the Supreme Court of the United States; the judgment in said case affecting a class of cases.

(Signed) E. P. NORTON,
*Solicitor for the United States.*

8 At a Court of Claims held at the Capitol, in the city of Washington, on Monday, February 3d, A. D. 1868.

HENRY J. HOSMER
*vs.*
THE UNITED STATES. } No. 2,891.

Ordered, that the petition for appeal, filed by the solicitor for the United States, in this case be allowed.

9 In the Court of Claims.

*On demurrer.*

HENRY J. HOSMER
*vs.*
THE UNITED STATES. }

Opinion of Casey, C. J.:

The claimant sets forth that he was lately a private in company B,

15th regiment of Massachusetts volunteers, which was organized for the suppression of the rebellion. That he was enrolled and entered the service of the United States on or about the 12th day of July, 1861, and was discharged by reason of a surgeon's certificate of disability on or about January 5, 1863.

He further states that on the 3d day of May, 1861, the President of the United States called for a volunteer force to aid in the enforcement of the laws and the suppression of the insurrection, by a proclamation which states that the enrolment and organization will be made known through the War Department.

That in pursuance thereof, General Orders No. 15, War Department, was issued May 4, 1861, which promulgated a plan of organization for said forces; that paragraph 2 of memorandum 4, of said order, promises to "every volunteer, non-commissioned officer, private, musician, and artificer, who enters the service of the United States under this plan, * * * when honorably discharged, * * * * the sum of one hundred dollars."

That General Orders No. 25, War Department, May 25, 1861, after revoking certain parts of the foregoing order, states that "Every volunteer, non-commissioned officer, private, musician, and artificer, who enters the service of the United States under this plan, shall be paid * * * * when honorably discharged * * * * the sum of one hundred dollars."

That by act of Congress, August 6, 1861, said proclamation and orders were legalized.

That your petitioner, relying upon the promises set forth as aforesaid by the President of the United States and the Secretary of War, enlisted in the service of the United States, and performed his duties faithfully as a soldier; but that by reason of disability his discharge was afterwards deemed necessary before the three years of his enlistment had expired, although not sought for by himself. That he was accordingly discharged, honorably, from the service of the United States, on or about January 5, 1863. That he never received "the sum of one hundred dollars" from the United States, although he has endeavored to obtain it from the proper officials, and although honorably discharged without fault on his part.

To this petition the United States, by their solicitor, file a general demurrer.

The solicitor contends that the claim cannot be maintained, because the act of July 22, 1861, 12 Stat., 268–9, only allows such claim when the individual "shall have served for a period of two years, or during the war, if sooner ended." And that such act is by its first section expressly made retro-active, and to apply to all who had theretofore been accepted into the service of the United States.

The claimant replies, that the act of July 22, 1861, cited by the solicitor, should not be held to divest his contract with the United States previously entered into. Especially as by the act of August 6, 1861, sec. 3, 12 Stat., 326, Congress enacted that "all the acts, proclamations, and orders of the President of the United States, after the fourth of March, 1861, respecting the

army and navy of the United States, and calling out or relating to the militia or volunteers from the States, are hereby approved, and in all respects legalized and made valid, to the same intent and with the same effect as if they had been issued and done under the previous express authority of the Congress of the United States."

A large class of cases depends upon the solution of the question here made. Were it not for the act of July 22, 1861, the case would be free from doubt and difficulty. The acts of July and August being in pari materia, should be and must be construed together. The only question is whether Congress by the provisions of the first act intended to change and modify the agreement made with those who volunteered under the promise of the bounty, upon being honorably discharged. Standing alone such would be the clear and conclusive indication. But the act of August 6, 1861, is so strong and sweeping in its adoption and ratification of all the proclamations and orders under which the claimant and others volunteered, that we can only give full effect to the terms used by holding that they are entitled to the one hundred dollars upon an honorable discharge, according to the contract of enlistment.

The question, we admit, is not entirely free from doubt. And the fact that the cause represents a large class of cases, and therefore gives the United States the right of appeal, while the limited amount in controversy debars the claimant from it, has determined our finding in favor of the claimant.

We therefore hold that the proclamation and orders set forth, the enlistment under them by the claimant, and the subsequent confirmation and ratification of those executive acts by Congress in the act of August 6, 1861, constitute a contract to pay the claimant one hundred dollars, he having served more than a year, and having been honorably discharged, and that such contract is unaffected by the act of July 22, 1861.

Judgment for claimant for one hundred dollars.

11 In the Court of Claims.

HENRY J. HOSMER
*vs.*
THE UNITED STATES. } No. 2,891.

I, John Randolph, ass't clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and the final judgment of the court thereon; of the application of the solicitor for the United States for the allowance of an appeal, and of the order of the court allowing the same; and of the opinion of the court setting forth the facts and conclusions of law, upon which its final judgment is based.

In testimony whereof I have hereto set my hand and affixed the seal of said court, at Washington, this 11th day of November, A. D. 1868.

[SEAL.]

JOHN RANDOLPH,
*Ass't Clerk Court of Claims.*

# In the Supreme Court of the United States.

DECEMBER TERM, 1869.

THE UNITED STATES, APPELLANTS,
*vs.*
HENRY J. HOSMER.
No. 102.

*Brief for the appellants.*

This case comes here by appeal from the Court of Claims, where judgment was given in favor of the appellee for the sum of one hundred dollars, claimed as bounty for enlisting in the volunteer army of the United States, in 1861.

It appears that the claimant was a private soldier in the fifteenth regiment of Massachusetts volunteers, being enrolled and entering the service about the 12th day of July, 1861, and was discharged, by reason of a surgeon's certificate of disability, about January 5, 1863.

The bounty claimed was, by General Orders from the War Department, Nos. 15 and 25, of May 4 and May 25, resting for their authority on the proclamation of the President, issued May 3, 1861, promised to enlisted men who entered the service of the United States "under this plan," when honorably discharged.

Of "this plan" the details were set forth in the general orders just mentioned. But the amount of force to be raised was determined by the proclamation at forty regiments—thirty-nine of infantry and one of cavalry—making a maximum of forty-two thousand and thirty-four officers and enlisted men, of which force Massachusetts was to raise six regiments.

The case does not show that the regiment into which the appellee enlisted was ever accepted into the service of the United States as one of those six regiments apportioned to Massachusetts, or in any manner under the authority of said proclamation. On the other hand, the inference, from the proven facts, is strong to the contrary, as will hereafter appear.

The first lawful authority given to these and similar proceedings of President Lincoln, is to be found in the act of Congress of July 22, 1861 (XII, 268), entitled—

"An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property."

Its first provision was—

"That the President be, and he is hereby, authorized to accept the services of volunteers * * * in such numbers, not exceeding five hundred thousand, as he may deem necessary for the purpose of repelling invasion, suppressing insurrection, enforcing the laws, and preserving and protecting the public property."

In its same first section, this act further provided as follows:

"And all provisions of law applicable to three years' volunteers shall apply to two years' volunteers, and to all volunteers *who have been* or may be accepted into the service of the United States for a period not less than six months, in the same manner as if such volunteers were specially named."

The following sentence also began with these words:

"Before receiving into service any number of volunteers exceeding those *now called for and accepted*, the President shall"——

Thus plainly did this section ratify the previous action of the President in calling out troops, and made valid the engagements entered into on behalf of the United States by the President, *so far, of course, as those engagements were compatible with the provisions of this statute, and no further.*

Furthermore, this statute throughout exhibits an intent to comprehend the whole matter of the raising, organizing, and paying the volunteer forces which were to

put down the rebellion. With the spirit of this purpose the act is "vital in all its parts," as can only properly be shown by reading carefully all its sections from the first to the twelfth.

Section 5 related to the pay of these troops, and, *inter alia*, provided that—

"Every * * * private * * * who enters the service under this act shall be paid * * * when honorably discharged * * * *if he shall have served for a period of two years, or during the war, if sooner ended*, the sum of one hundred dollars." (p. 270.)

To this bounty, the next (6th) section entitled the widow or legal heirs "of such as die or may be killed in service." (p. 270.)

Beyond these provisions there is no authority of law to give validity to the appellee's claim.

Because by this statute Congress had so comprehensively and completely regulated this matter of accepting troops and paying them bounty, for the past as well as for the future, that the general ratification of the President's acts in this regard is to be held as subject to the modifications to be found in these special provisions. This is maintained on the authority of that rule of construction which holds that special statutes prevail over general statutes.

Further, that such was the intent of this legislation, appears plainly from other enactments touching the same matter.

The same proclamation under which the appellee claims that bounty was promised to him on his enlistment as a volunteer, called also for an increase of the regular army, promising, however, no bounty to soldiers enlisting therein. This matter received the attention of Congress in the act approved July 29, 1861, just a week after the approval of the act relating to volunteers.

This act also in its 5th section, regulated the matter of bounty; and provided that "men enlisted in the regular forces * * * shall be entitled to the same bounties, in every respect, as those allowed or to be allowed to the men of the volunteer forces, under, however, this condition, namely, if they enlisted "*after the first of July, eighteen hundred and sixty-one.*" (XII, 281.)

This statute plainly implies but one rule of bounty for volunteers; not two rules, one prevailing before and one after July 22, 1861; and the rule there implied, a little reflection will show to be the rule established by the statute of the last-named date, confessedly the only rule of law upon that subject.

The first specific appropriation for bounties to volunteers is to be found in an appropriation act of July 15, 1862; and in that part of the act which makes appropriations "for the year *ending the thirtieth of June, eighteen hundred and sixty-three.*" This appropriation was "for payment of bounty to volunteers * * * *authorized by the fifth and sixth sections* of an act * * * approved July twenty-second, eighteen hundred and sixty-one." (XII, p. 518.)

Upon this recital of the statutes, it will doubtless become clear to the court, that no law of the United States has ever sanctioned the contract of which the appellee seeks to obtain the enforcement. Also, that no officer of the United States has ever been by law authorized to pay to him the bounty money which he seeks to recover. If then, it be added that the Court of Claims is merely a court of law, a body not clothed with law-making powers, it follows that the duty of that court was, and still is, to dismiss this petition.

But beside this statement of law, there is matter of fact to be objected to the claim of the appellee.

The case does not show, as has before been stated, the acceptance of the service of the appellee under the proclamation which he alleges to have promised to him one hundred dollars bounty. His own enrollment took place on July 12; and ten days may well have elapsed before the regiment was mustered into the service of the United States, in which case the regiment would have been received as a portion of the force mentioned in the act of July 22, 1861, as in fact other regiments were, though raised early enough to have constituted a portion of the quotas assigned under the proclamation of May 3, 1861—the statute supplanting the proclamation as an authority to raise troops.

E. R. HOAR,
*Attorney General of the United States.*

SUPREME COURT OF THE UNITED STATES.

No. 300.

# THE UNITED STATES, Appellants, vs. HENRY J. HOSMER.

## APPEAL FROM THE COURT OF CLAIMS.

BRIEF OF DEFENDANT IN ERROR.

I. This case comes before the Court by appeal of the United States, on decision of the Court of Claims in favor of the defendant in error. Claimant was enrolled as a Private in Company B, 15th Massachusetts Volunteers, on or about July 12, 1861, and was discharged for disability on or about January 5, 1863. This regiment was one of many raised throughout the North under President's proclamation, May 3, 1861, and General Orders War Department, No. 15, May 4, 1861, and No. 25, May 25, 1861. In these Orders every man who enters the service under this plan is promised *when honorably discharged*, the sum of $100. Act of July 22, 1861, subsequently passed, after Congress came together, gave a bounty of $100 to soldiers honorably discharged, provided they should have served two years. Subsequent Acts of Congress removed the two years restriction as to soldiers discharged for wounds, but not as to soldiers discharged for sickness. Hence the Treasury Department refused payment in this class of cases.

II. The defendant, relying upon the foregoing facts, and referring to the transcript of the record on file, seeks to establish the following points :

1. Enlistments are contracts, and are to be construed like other contracts. (6 Att. Gen. Opin. 190.)

2. The contract into which plaintiff entered with the United States is embraced in the proclamation and General Orders set out in his petition and the foregoing statement of facts. This being in writing, cannot be limited by any restrictions raised by implication and not therein contained. (2 Kent Com. 556.)

3. A promise of $100 "when honorably discharged," does not mean "when honorably discharged *for wounds*," or "when honorably discharged *after two years' service*." Discharge on Surgeon's certificate of disability (i. e. for sickness,) is as much an honorable discharge as discharge for "wounds;" and a discharge after several months' service is as honorable as a discharge after two years' service, if a man's constitution gave way under the exposure and hardships of a campaign life, and he became unfit to remain longer. In any of these cases Government uses him as long as he can work, and finally terminates the contract of its own choice,

not the claimant's. Note the language of Act July 22, 1861, §5, c. 9, and of the General Orders above mentioned, published by the War Department.

4. The President, issuing orders through the Secretary of War, had a right to promise this allowance, there being no previous law on the subject. (Gratiot vs. United States, 4 How. 80; United States vs. Eliason, 16 Pet. 291.) Did not the emergency justify the President in issuing the proclamation for volunteers at the time, when otherwise the nation might have perished? And if he had authority to call out the troops, had he not authority to stipulate for their payment?

5. But if it be admitted that there was no valid agency; that the President had not in fact the right to call forth these volunteers and bargain for their pay and allowance, (a position which the United States would hardly feel safe in assuming,) the above proclamation and orders were fully legalized by Act August 6, 1861, §3, c. 63. This Act is so clear in its language that the Court of Claims deemed it conclusive in the claimant's favor.

6 The position is assumed by the plaintiff in error, that Act July 22, 1861, §5, c. 9, is to be treated as limiting the terms of the contract under which the claimant was already bound; in other words, making it necessary that he should be "honorably discharged after two years' service." This is a forced construction of the Act. Retroactive laws, if not absolutely void so far as the United States is concerned, are always contrary to public policy, and intent of this sort should not be inferred in an Act of Congress without the most positive language. A reasonable construction of Acts July 22, 1861, and August 6, 1861, raises a different intent, and one most consistent with justice and good faith.

7. It cannot be said that claimant, by Act of July 22, 1861, was placed on the "bounty" footing of subsequent volunteers. There was no such word as "bounty," in this sense, when claimant enlisted. The so-called bounty system grew up afterwards, and is no more a uniform system than that of the Government loans. All such acts were based on the necessities of the Government for the time being; and examination of the bounty acts shows that there were constant changes in the "bounty system," with analogies favorable to the present claim.

8. It should be considered that, once enlisted, the claimant could not withdraw, and that his enlistment was in no wise conditional upon the Acts of Congress. It was supposed when he enlisted that the war would be a short one, and his service was full as long as Government had anticipated. He was obliged to fulfil his contract, and he served faithfully until sickness, incurred in his country's defence, compelled his discharge.

HENRY J. HOSMER,

by his Counsel, JAMES SCHOULER.